

Supreme Court, U. S.
FILED

APR 18 1976

**In the
Supreme Court of the United States.**

OCTOBER TERM, 1975.

No.

75-1465

ATLANTIC TUBING & RUBBER COMPANY,
PETITIONER,

v.

INTERNATIONAL ENGRAVING COMPANY,
RESPONDENT.

**Petition for a Writ of Certiorari to the United States
Court of Appeals for the First Circuit.**

GEORGE M. VETTER,
HINCKLEY, ALLEN, SALISBURY & PARSONS,
2200 Industrial Bank Building,
Providence, Rhode Island 02903.

Of Counsel:

FRANK T. BARBER, III,
LECOMTE, SHEA & DANGORA,
27 School Street,
Boston, Massachusetts 02108.

BATEMAN & SLADE, INC.,

BOSTON, MASSACHUSETTS.

Table of Contents.

Citations to opinions below	2
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement of the case	4
A. The parties	4
B. Nature of the case	4
Reasons for granting the writ	8
I. The Court's of Appeals holding in this case that "[a]lthough a trial court must be sensitive to the principles of <i>Gallick</i> and <i>Atlantic & Gulf Steve-</i> <i>dores</i> , it has considerable discretion in applying them," is in conflict with the Seventh Amend- ment to the United States Constitution and the decisions of the Supreme Court	8
II. The Court of Appeals has the same affirmative constitutional duty as a trial court to reconcile the answers of a jury to special questions; the Court's of Appeals holding in this case that a trial court's "refusal to enter judgment on the basis of a jury's answers to a set of interroga- tories should not be reversed simply because an appellate court concludes that it is possible to reconcile the jury's responses" (App. 19) is wrong, and conflicts with the decisions of this Court and of other circuits	9
III. This Court should decide whether a trial court has the power to submit more than one set	

of special questions to a jury under Rule 49(a), in order to establish clear standards for the use of that rule in complex litigation	10
Conclusion	12
Appendices	follow page 12

Table of Authorities Cited.

CASES.

Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Limited, 369 U.S. 355 (1962)	2, 3, 8, 10
Gallick v. Baltimore & Ohio Railroad Co., 372 U.S. 108 (1963)	2, 3, 8, 9, 10
Shaffer v. Great American Indemnity Co., 147 F. 2d 981 (5th Cir. 1945)	10
Wolfe v. Virusky, 470 F. 2d 831 (5th Cir. 1972)	10

CONSTITUTIONAL AND STATUTORY PROVISIONS.

United States Constitution, Seventh Amendment	2, 3, 8, 9, 11
28 U.S.C.	
§ 1254(i)	2
§ 1332	4

PROCEDURAL RULES.

Federal Rules of Civil Procedure	
Rule 49	2, 3, 8, 10, 12
Rule 49(a)	3, 5, 10, 11

**In the
Supreme Court of the United States.**

OCTOBER TERM, 1975.

No.

ATLANTIC TUBING & RUBBER COMPANY,
PETITIONER,

v.

INTERNATIONAL ENGRAVING COMPANY,
RESPONDENT.

**Petition for a Writ of Certiorari to the United States
Court of Appeals for the First Circuit.**

Petitioner, Atlantic Tubing & Rubber Company, prays that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the First Circuit entered in the above-entitled case on January 13, 1976, which appears in Appendix B hereto, *infra* (App. 14).

Citations to Opinions Below.

The first trial in the United States District Court for the District of Rhode Island ended in a mistrial. The decision ordering a mistrial is not reported officially, but is reproduced in Appendix A (App. 1).

The second trial in the United States District Court for the District of Rhode Island ended in a judgment entered pursuant to a general jury verdict for defendant.

The opinion of the United States Court of Appeals for the First Circuit which affirmed the judgment of the District Court is reported at _____ F. 2d _____ (1st Cir. 1976) and appears in Appendix B hereto, *infra* (App. 14).

Jurisdiction.

The judgment of the United States Court of Appeals for the First Circuit was entered on January 13, 1976 (*infra*, App. 14, p. 23). The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented.

I. In cases submitted to a jury for a special verdict under Federal Rules of Civil Procedure, Rule 49, does the Seventh Amendment to the United States Constitution and the Supreme Court decisions in *Gallick v. Baltimore & Ohio Railroad Co.*, 372 U.S. 108 (1963), and *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Limited*, 369 U.S. 355 (1962), require courts to "attempt to reconcile the jury's findings, by exegesis if

necessary," before the courts may disregard the jury's special verdict and declare a new trial?

II. Is the Court of Appeals in conflict with the requirements of the Seventh Amendment to the United States Constitution and the decisions of the Supreme Court in *Gallick v. Baltimore & Ohio Railroad Co.*, 372 U.S. 108 (1963), and *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Limited*, 369 U.S. 355 (1962), in holding that "although a trial court must be sensitive to the principles of *Gallick* and *Atlantic & Gulf Stevedores*, it has considerable discretion in applying them"?

III. If a Court of Appeals concludes that it is possible to reconcile a jury's responses to special questions submitted under F.R.C.P. 49, does the Court's of Appeals, holding in this case, that a court of appeals should not reverse a trial court's holding that the jury's responses were not reconcilable, conflict with the requirements of the Seventh Amendment and the decisions of the Supreme Court in *Gallick v. Baltimore & Ohio Railroad Co.*, 372 U.S. 108 (1963), and *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Limited*, 369 U.S. 355 (1962)?

IV. Does the trial court, once having submitted a set of written questions under Rule 49(a) of the Federal Rules of Civil Procedure, and once having received the jury's written responses thereto, have the power under Rule 49(a), or otherwise, to submit a second set of written questions to the jury?

Statutes Involved.

The statute involved is the Seventh Amendment to the Constitution of the United States. It is printed herein as part of Appendix D, *infra* (App. 34).

Statement of the Case.

This is a civil action for damages for breach of warranty, breach of contract, products liability, and negligence commenced in March of 1973. Jurisdiction of the District Court was invoked under 28 U.S.C. § 1332.

A. THE PARTIES.

Plaintiff, Atlantic Tubing & Rubber Company (Atlantic), is engaged in the production of vinyl plastic sheeting for use in such products as curtains and draperies, and is incorporated under the laws of the State of Rhode Island, having its principal place of business in Cranston, Rhode Island.

Defendant, International Engraving Company, is engaged in the design, manufacture and engraving of steel embossing rolls for use in plastic production plants, and is incorporated under the laws of the State of New Jersey, having its principal place of business in Cedar Grove, New Jersey.

B. NATURE OF THE CASE.

In 1965, plaintiff ordered from defendant an embossing roll, or cylinder, to be used in the plaintiff's plant in the manufacturing process of forming soft plastic into vinyl sheets (App. 15). Plaintiff specified that the ends of the embossing roll were to be of one-piece construction — *i.e.*, that the heads and journals of the roll were to be made from a single piece of steel (App. 15). Rather than manufacture and supply an embossing roll as specified, defendant changed the design of the heads and journals to two-piece construction — that is, the heads and journals were joined together by means of a shrink

fit and a weld (App. 15-16). There are degrees of shrink fit which vary depending upon the stresses and strains which the product has to bear (App. 15 n. 1). Embossing rolls are operated at different temperatures and pressures, depending upon the type of product being embossed (App. 16). The specific operating data are important design criteria in determining the degree of shrink fit to be applied in two-piece construction (App. 15-16). When the defendant changed the design of the roll and employed a shrink fit, the defendant was unaware of the specific operating data under which plaintiff would operate the roll. On March 25, 1972, while the roll was being operated in a normal manner, a weld fractured and one journal and head separated from each other, allowing a flammable coolant to leak out, vaporize and ignite, causing considerable damage to plaintiff's property (App. 16).

The plaintiff proceeded to the first trial on the basis of three separate theories of recovery — strict liability, negligence in design and negligence in manufacture. At the close of the evidence the district court submitted 18 special questions to the jury under Rule 49(a) (App. 17).

In summary, the jury's responses to the first set of questions were as follows:

A. Question 1 involved methanol. The jury answered that defendant could have foreseen the use of methanol or other flammable coolant (App. 24).

B. Questions 2 through 9 involved the theory of strict liability (App. 24-27).

To question 2 the jury found the embossing roll was not unreasonably dangerous (App. 24).

To question 5 the jury found that plaintiff did not authorize defendant to modify the embossing roll from one piece to two piece design (App. 25-26).

To question 6 the jury found defendant designed, manufactured, and delivered a two piece roll to plaintiff in 1965 (App. 26).

To question 7 the jury found that a two piece design was not unreasonably dangerous (App. 26).

C. Questions 10 through 14 involved the theory of negligence in design (App. 27-29).

To question 10 the jury found that in 1965 defendant designed, manufactured, and delivered to plaintiff a two piece embossing roll (App. 27).

To question 11 the jury found that in 1965, plaintiff had ordered from defendant an embossing roll of one piece design and construction (App. 27-28).

To question 13 the jury found that the defendant was negligent in modifying the design from a one piece to a two piece construction without having knowledge of the specific operating data (App. 28).

To question 14 the jury found that this negligence was *the* direct and proximate cause of the plaintiff's damage (App. 28-29).

D. Questions 15 and 16 involved the theory of negligence in manufacture (App. 29).

To question 15 the jury found defendant was negligent by failing to properly weld and/or shrink fit the two piece roll (App. 29).

To question 16 the jury found that this negligence was not the direct and proximate cause of plaintiff's damage (App. 29).

(It is important to note here that the court instructed the jury in terms of *THE* proximate cause (App. 7).

E. Questions 17 and 18 involved contributory and degrees of negligence (App. 29-30).

To question 17 the jury found plaintiff negligent in three respects (failing to inspect for defects and to take adequate precautions should coolant escape, failure in operation,

maintenance and repair), but not negligent in using a flammable coolant (App. 29-30).

To question 18 the jury found plaintiff was 55 per cent negligent (App. 30).

The district court never found that the jury's initial responses were inconsistent,* but submitted a second set of questions to the jury for purposes of clarification. After receiving the jury's responses to the second set of questions, the district court then engaged in a lengthy analysis of the jury's responses to both sets of questions (App. 1-11). The district court compared the jury's second answers to the jury's first answers and concluded that "there is simply no view of the case which makes the jury's answers, *taken as a whole*, consistent with the entry of judgment of either party" (App. 10). The district court then declared a mistrial.

Plaintiff attempted to appeal the district court's order of mistrial but the Court of Appeals dismissed the appeal on the ground that the declaration of a mistrial was an interlocutory order (App. 12-13).

The second trial was limited to the plaintiff's negligence theory, and was submitted to the jury for a general verdict. After deliberation, the jury returned a general verdict for the defendant (App. 14-15).

Plaintiff appealed and the Court of Appeals entered an order and opinion affirming the judgment and orders of the district court on January 13, 1976 (App. 23).

*Note that the jury initially found that the defendant was negligent in modifying the design without having knowledge of specific operating data (App. 28), and that this negligence was the direct and proximate cause of the plaintiff's damage (App. 28-29). The jury also found that the plaintiff's contributory negligence contributed to the damage (App. 29-30). What greater consistency could be found in a negligence case?

Reasons for Granting the Writ.

- I. THE COURT'S OF APPEALS HOLDING IN THIS CASE THAT "ALTHOUGH A TRIAL COURT MUST BE SENSITIVE TO THE PRINCIPLES OF *GALLICK* AND *ATLANTIC & GULF STEVEDORES*, IT HAS CONSIDERABLE DISCRETION IN APPLYING THEM," IS IN CONFLICT WITH THE SEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE DECISIONS OF THE SUPREME COURT.

The Seventh Amendment guarantees the right to trial by jury in civil actions.

Rule 49 of the Federal Rules of Civil Procedure establishes procedures for submitting cases to a jury on the basis of special questions, rather than solely on a general verdict.

The Supreme Court has recognized an inherent danger in Rule 49, that, in utilizing Rule 49 procedures, a court may encroach upon or usurp the fact-finding function of the jury. To guard against this danger, and to make Rule 49 procedures consistent with the Seventh Amendment, this Court has held as follows:

"Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way. For a search for one possible view of of the case which will make the jury's finding inconsistent results in a collision with the Seventh Amendment." *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Limited*, 369 U.S. 355, at 364 (1962).

"We [the courts] therefore must attempt to reconcile the jury's findings, by exegesis if necessary, . . . before we are free to disregard the jury's special verdict and remand the case for a new trial." *Gallick v. Baltimore & Ohio Railroad Co.*, 372 U.S. 108, at 119 (1963).

These holdings are not discretionary admonitions, but are mandatory constitutional requirements.

The Court of Appeals in this case held:

"Although a trial court must be sensitive to the principles of *Gallick* and *Atlantic & Gulf Stevedores*, it has considerable discretion in applying them, and its refusal to enter judgment on the basis of a jury's answers to a set of interrogatories should not be reversed simply because an appellate court concludes that it is possible to reconcile the jury's responses." (App. 19.)

This holding pays lip service to the requirements of the Seventh Amendment and the decisions of this Court, while at the same time reducing them to a matter of mere discretion with the trial court. It makes the constitutional mandate of no more moment than a ruling on pretrial discovery.

- II. THE COURT OF APPEALS HAS THE SAME AFFIRMATIVE CONSTITUTIONAL DUTY AS A TRIAL COURT TO RECONCILE THE ANSWERS OF A JURY TO SPECIAL QUESTIONS; THE COURT'S OF APPEALS HOLDING IN THIS CASE THAT A TRIAL COURT'S "REFUSAL TO ENTER JUDGMENT ON THE BASIS OF A JURY'S ANSWERS TO A SET OF INTERROGATORIES SHOULD NOT BE REVERSED SIMPLY BECAUSE AN APPELLATE COURT CONCLUDES THAT IT IS POSSIBLE TO RECONCILE THE JURY'S RESPONSES" (APP. 19) IS WRONG, AND CONFLICTS WITH THE DECISIONS OF THIS COURT AND OF OTHER CIRCUITS.

The Seventh Amendment applies to all courts. The Supreme Court held in *Gallick*, *supra*, that the affirmative duty

to reconcile a jury's findings, by exegesis if necessary, applies to the courts of appeal and the Supreme Court, as well as the district courts.

A major purpose of Rule 49(a) is to put the appellate court in the identical position as the district court in viewing the jury's findings. The history of Rule 49 makes this clear and other circuit courts of appeal have explicitly so held. See *Shaffer v. Great American Indemnity Co.*, 147 F. 2d 981 (5th Cir. 1945); *Wolfe v. Virusky*, 470 F. 2d 831 (5th Cir. 1972). Thus, the Court of Appeals has an affirmative duty independent of the district court to search for consistency and reconcile the jury's answers, by exegesis if necessary.

Here, the Court of Appeals held that the trial court had "considerable discretion" in applying the constitutional principles of *Gallick* and *Atlantic & Gulf Stevedores*. The Court of Appeals then held that it should reverse "only if we find that the district court abused its discretion . . ." (App. 19). Thus, the Court of Appeals not only relieved the district court of the constitutional requirements, but also exculpated itself from these self-same constitutional requirements. This holding conflicts with the decisions of the Supreme Court and the decisions of other circuits stated above.

III. THIS COURT SHOULD DECIDE WHETHER A TRIAL COURT HAS THE POWER TO SUBMIT MORE THAN ONE SET OF SPECIAL QUESTIONS TO A JURY UNDER RULE 49(a) IN ORDER TO ESTABLISH CLEAR STANDARDS FOR THE USE OF THAT RULE IN COMPLEX LITIGATION.

The way in which the courts below dealt with the Rule 49 issues in this case has grave repercussions for the use of that rule.

The district court never found that the first jury answers were inconsistent. It submitted a second set of questions only to clarify the jury's answers to the first questions. The district court did not attempt to search for consistency and to reconcile, by exegesis if necessary, the first answers. It found inconsistency only upon comparing the second answers with the first answers (App. 1-11).

On appeal, plaintiff contended that the district court had no power to submit additional questions, that the first answers were consistent, and that the Court of Appeals had an independent duty to search for that consistency (App. 18). The Court of Appeals evaded these issues.

The Court of Appeals never found that the first answers were inconsistent, and itself failed to search for consistency. It only pointed out that "the jury's answers were difficult to reconcile" (App. 20). The Court of Appeals held that the district court did not abuse its discretion in refusing to enter judgment on the first jury answers (App. 20-21), which, however, were never found inconsistent by the district court (App. 1-11). Since the Court of Appeals held that the district court did not abuse its discretion in refusing to enter judgment on the first answers (despite the lack of a finding of inconsistency), it concluded that the submission of the second questions was harmless error. Thus, in effect, the Court of Appeals sanctioned the use of more than one set of special questions by the district court.

This holding violates the Seventh Amendment and, in addition, would destroy the utility of Rule 49(a). As a matter of policy, if a district court can submit more than one set of special questions to a jury for mere clarification, or for any other reason in its discretion, it would be under no constraint to frame clear and comprehensive questions, in the first place, or to search for consistency, by exegesis if necessary, in the

second place. This would lead to poor judicial administration. In addition, this could lead to manipulation of jury verdicts by the courts.

Conclusion.

Rule 49 has been recognized as a useful procedure in complex litigation. The potential for the increased use of Rule 49 in modern litigation is self-evident. As a matter of policy, this Court should establish clear guidelines as to the scope of the trial court's power in utilizing Rule 49 procedures, and should establish standards for the use of those procedures in future cases.

For the above reasons and for the reasons stated within, the petition for certiorari should be granted.

Respectfully submitted,
 GEORGE M. VETTER,
 HINCKLEY, ALLEN, SALISBURY
 & PARSONS,
 2200 Industrial Bank Building,
 Providence, Rhode Island 02903.

Of Counsel:

FRANK T. BARBER, III,
 LECOMTE, SHEA & DANGORA,
 27 School Street,
 Boston, Massachusetts 02108.

Appendices.

TABLE OF CONTENTS.

Appendix A	1
Memorandum and order of United States District Court for the District of Rhode Island	1
Order of United States Court of Appeals for the First Circuit	12
Appendix B	14
Opinion of United States Court of Appeals for the First Circuit	14
Judgment of United States Court of Appeals for the First Circuit	23
Appendix C	24
Jury interrogatories	24
Further jury interrogatories	31
Appendix D	34
United States Constitution, Amendment VII	34
Federal Rules of Civil Procedure, Rule 49	34

Appendix A.

**UNITED STATES DISTRICT COURT.
DISTRICT OF RHODE ISLAND.**

ATLANTIC TUBING & RUBBER CO.

v.

C.A. No. 5142.

INTERNATIONAL ENGRAVING CO.

Memorandum and Order.

This matter is before me on the issue of entry of judgment following the jury's answers to special questions pursuant to Rule 49(a), Fed. R. Civ. P. On Friday, April 12, 1974, the Court submitted the case to the jury in the form of 18 special questions. The first nine questions related to strict liability for alleged defective design and/or manufacture of an embossing roll manufactured by defendant and sold to plaintiff. The remaining questions dealt with a separate theory of liability for alleged negligent design and/or manufacture. Questions 17 and 18 concerned plaintiff's possible contributory negligence in accordance with Rhode Island's comparative negligence statute, R.I.G.L. Sec. 9-20-4. After a long deliberation, the jury returned answers to those 18 questions on the evening of April 12.

The Court, being of the opinion that the jury's initial responses were at least ambiguous, if not inconsistent, determined that the jury should be asked several additional questions in an attempt to resolve the ambiguities apparent from the jury's initial responses. On Monday April 15, 1974, over plaintiff's objection, the Court submitted four additional questions to the jury (questions A through D). After further deliberations, the jury returned answers to the further ques-

tions, accompanied by an explanatory note signed by all the jurors.

Both the initial and supplementary questions pertained only to liability and not to damages. Because the Court and parties agreed that jury's answers would have to be scrutinized with great care before entry of judgment was made, it was agreed that the jury should be discharged without considering damages and that the issue of damages would be resolved by the Court in the event that judgment was entered for the plaintiff. The Court has received post-trial memoranda from both sides on the question of whether the jury's answers can be reconciled in order for the Court to enter judgment for either party.

Briefly summarized, it is plaintiff's contention that the original 18 answers returned by the jury should have been reconciled in its favor, that it was error for the Court to seek clarification by additional questions and that, therefore, the jury's answers to the supplemental questions, as well as its explanatory note, should be ignored by the Court and judgment should be entered for the plaintiff. Alternatively, plaintiff argues that even if the supplemental answers are considered by the Court, that a plaintiff's verdict is still in order.

Defendant, on the other hand, places heavy emphasis on the jury's response to supplementary question "D", would interpret the jury's answer to question 14 as a finding that the negligence referred to in question 13 was the proximate cause of some damage *other* than fire damage to plaintiff's property, and that a judgment for defendant is mandated.

It appears to the Court that a fair reading of the jury's responses to questions 1 through 9 support the legal conclusion that defendant is not liable under the theory of strict liability, as that concept is explained in *Ritter v. Narragansett Electric Co.* 283 A. 2d 25 S. (R.I. 1971) and the Restatement of Torts sec. 402 A. The difficulty arises in reconciling the

jury's responses to those questions pertaining to the wholly separate theory of liability for negligence embodied in the remaining questions.¹

In summary fashion, the jury found as follows:

1) that the defendant was negligent in modifying the design of the embossing roll from one-piece to two-piece construction without having knowledge of the specific pressures, temperatures, speeds, and other operating data as to how plaintiff would use the roll, and that such negligence was the direct and proximate cause of damage to plaintiff.

(Answers to #13 and 14)

2) that the defendant was negligent in failing to properly weld and/or shrink fit the two-piece embossing roll, but that such negligence was *not* the direct and proximate cause of damages to the plaintiff.

(Answers to #15 and 16)

¹ I do not find that the questions confused the two distinct concepts of strict liability and negligence. See *Hager v. Gordon*, 171 F. 2d 90 (9th Cir. 1948). Questions 1 through 9 dealt with the concept of strict liability, defined in terms of a "defective condition unreasonably dangerous to the user", the classic definition formulated in the Restatement of Torts, sec. 402A (see especially, comment g). Thus, the term "defect" for purposes of strict liability is defined in terms of unreasonably dangerous. While the two concepts of strict liability and negligence may indeed be overlapping, the Supreme Court of Rhode Island has sanctioned the use of the two as alternative theories of products liability, see *Ritter, supra*, and implicit in that approval is that a defendant may be found to have acted negligently in manufacturing or designing a product, without that product being considered "defective" in the strict liability sense.

3) that the two-piece embossing roll was negligently designed but that the negligent design did not cause the roll to rupture.

(Answers to # "A" and "B")

4) that the plaintiff's own negligence contributed to the injury to its property in several respects, and that such negligence contributed to plaintiff's property damage to the extent of 55%.

5) that the plaintiff modified the roll by changing the journals after delivery.

No single answer, viewed alone, is dispositive of this matter, and in order to determine if the jury's answers are consistent they must be read in the light of all the surrounding circumstances including the pleadings and the Court's instructions. *Gallick v. Baltimore & Ohio Railroad Co.*, 372 U.S. 108, 83 S. Ct. 659 (1963); *Halprin v. Mora*, 231 F. 2d 197 (3rd Cir.) 1956; *Martin v. Swift*, 258 F. 2d 797 (3rd Cir. 1958).

The Court is mindful of the strong policy against finding inconsistencies in the jury's answers to special questions, and the efforts that must be made by the trial court to reconcile the jury's finding, by exegesis if necessary, before it is free to disregard the jury's special verdict and remand the case for a new trial. *Gallick v. Baltimore and Ohio Railroad Co.*, *supra*, at 119, 83 S. Ct. at 666. "Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way." *Atlantic & Gulf Stevedores, Inc. v. Elleman Lines, Inc.*, 369 U.S. 355, 82 S. Ct. 780, 786 (1962). See *Momand v. Universal Film Exchange*, 72 F. Supp. 469 (D. Mass. 1947), *aff'd*, 172 F. 2d 37 (1st Cir. 1948). *Cert. denied*, 336 U.S. 967 (1949).

It is this Court's opinion, however, that it is impossible to harmonize the jury's answers under a fair reading of them, and that there is *no* view of the case that makes those answers consistent. To do otherwise would only denigrate the jury system either by ignoring some of the jury's answers¹ or by interpreting them in a way which the evidence would not support. Such tampering with the jury function is improper, even in light of the strong policy against a mistrial in a case submitted under Rule 49(a).

Plaintiff would have the Court reconcile the answers simply by ignoring the additional inquiries put to the jury by the Court in a form of supplemental questions. This I cannot accept. While question 13, a question submitted by plaintiff, was worded, perhaps inartfully, in terms of negligence in *modifying* the design from (one-piece to two-piece) I fail to see how such negligence could have caused the alleged property damage to plaintiff (answer #14) in light of the jury's further clarification that, although the two-piece roll was negligently designed (answer "A"), such design was *not* the cause of the

¹ Plaintiff argues that where ambiguous questions cause confusion, the courts must disregard them as mere surplusage, citing *Ratigan v. N.Y. Central Railroad Co.*, 291 F. 2d 548 (2d Cir. 1961). In *Ratigan*, the cause of the inconsistency in the special verdict were two questions which the Court found were unnecessary and improper. It was held that the legal conclusions represented in those answers could be disregarded because they conflicted with contrary factual findings made in earlier questions. In the instant case, the inconsistent answers are not such that they can simply be put aside as "immaterial", See *Gallick v. Baltimore & Ohio Railroad Co.*, *supra*, or ignored as unnecessary in order to achieve a desired result. The choice of which answers to ignore would be the sheerest of speculation and would dictate whether verdict should be entered for plaintiff or defendant. The verdict would then be that of the judge rather than the jury. See Judge Friendly, concurring and dissenting in *Ratigan*.

rupture (answer "B").³ The jury clearly found that the two-piece construction itself was *not* the direct and proximate cause of the fire (See "explanatory note", Appendix A). Having thus found the negligent design not to have been the cause of the rupture, I fail to see how the mere negligence in *modifying* the design of the roll to a two-piece design could have been the proximate cause of the fire. In other words, the jury's answers to questions 13, 14, "A", and "B" cannot be harmonized under any fair reading in light of the evidence in the case, and thus judgment cannot properly be entered for the plaintiff.

Plaintiff's argument that the entire set of supplementary questions and the jury's explanatory note be ignored is imper-suasive. It is clear that, unlike Rule 49(b), Rule 49(a) does not specifically provide for resubmission in light of inconsistent answers. Yet Rule 49(a) contains no guidance as to the alternative courses of action available to the Court in light of ambiguous or inconsistent answers, and several courts have resubmitted the original questions for reconsideration in light of inconsistencies, even under 49(a). See *Cherry v. Atlantic-Richfield Co.*, 456 F. 2d 1310 (5th Cir.), *cert. denied*, 409 U.S. 850 (1972); *Safeway Stores, Inc. v. Dial*, 311 F. 2d 595 (5th Cir. 1963); *Truitt v. Travelers Insurance Co.*, 175 F. Supp. 67 (S.D. Tex. 1959), *aff'd* 280 F. 2d 784 (5th Cir. 1960). See generally 9 Wright & Miller, *Federal Practice and*

³ Defendant would explain the apparent inconsistency by holding that the damage referred to in question 14 must have been interpreted by the jury to mean something *other* than fire damage to plaintiff's property. However, the evidence would not support such a view, See *United States Fidelity & Guaranty Co. v. Brian*, 337 F. 2d 881, 883 (5th Cir. 1964), and the instructions as to proximate causation contained the following:

"The real test is whether you find that the injury to plaintiff's property was the natural and probable consequence of the defective condition of the embossing roll or the negligence of the defendant."

Procedure: Civil Sec. at 517-18 (1971). Nor do I find *Griffin v. Matherne*, 471 F. 2d 911, 917 n. 6 (5th Cir. 1973) to dictate a contrary result, since in that case the Court simply did not reach the question of whether there could be a valid resubmission under Rule 49(a). Judge Brown, an active proponent of the use of special verdicts, expresses the view that the trial judge must be given great latitude to inquire of the jury as to its answers to special questions. He states:

"A critical time again arrives when the jury returns its special verdict. Great latitude is, and should, be available to the trial Judge *by inquiry of the jury, recharging and a direction to return for further deliberations*, to make sure that conflicts, if they exist, are purposeful, not inadvertent. The time, indeed the only time, that this can be done is before the jury verdict is received and the jury discharged. Of course the conflict on redeliberation might persist and if it did it would be proof positive of a purposeful conscious result achieved independently of its legal significance. But it is entirely possible that apparent conflicts or doubts and uncertainties in the light of the jury's actual answers can with all fidelity to the jury system be eliminated at that moment."

Brown, *Federal Special Verdicts: The Doubt Eliminator*, 44 F.R.D. 338, 351-52 (1968).
(emphasis added).

I see no greater harm in inquiring further of the jury by way of additional written questions than by colloquy between judge and jury, *Griffin v. Matherne, supra*; *Truitt v. Travelers Insurance Co., supra*, or by supplementary instructions, *Truitt, supra*. As to the propriety of considering the jury's

explanatory note, *See McVey v. Phillips Petroleum Co.*, 288 F. 2d 53 (5th Cir. 1961). Nor do I feel that the supplementary questions, or the so-called "preamble" thereto, can be said to have influenced the jury's conclusions, as alleged by the plaintiff. *See Truitt, supra*. Having further inquired of the jury, and that inquiry having confirmed the view that the initial responses were fatally inconsistent, it would be elevating form over substance to ignore their supplementary responses in order to enter judgment for plaintiff.⁴

Defendant would have the Court reconcile the jury's answers by finding that a "Yes" answer to question "D" serves to relieve defendant of all liability, including liability for negligence. That question, and the jury's response thereto, is as follows:

D. Do you find that the plaintiff modified the roll by changing the journals after delivery?

Answer: "Yes" or "No"

Answer: Yes

Defendant argues that the response to this question, regardless of the jury's answers to other questions, indicates that the jury found that the journal was *replaced* after delivery and that it cannot be held responsible for negligence as to a product which it neither designed or manufactured. However, the ambiguity of that question itself (a question added at the

⁴ Plaintiff further argues that the submission of additional questions on liability subsequent to the publication of a news story in the *Providence Journal-Bulletin* on Saturday, April 13 prejudiced its rights under the Seventh Amendment and for that reason alone, the additional questions should be disregarded. In light of the Court's explicit cautionary instructions before the jury was excused on Friday, April 12, I cannot accept plaintiff's contention that the appearance of the news story in question is sufficient grounds for rejecting the jury's subsequent findings.

specific request of defendant), coupled with the jury's other responses as to defendant's negligence, leads me to the conclusion that defendant's simplistic analysis is not permitted from a fair reading of the jury's responses viewed as a whole.

As plaintiff points out, it is a mere speculative inference that the jury's affirmative answer to question "D" meant that they found defendant to have completely removed the original journals (manufactured by defendant) and replaced them with other journals. There was also evidence in the case that the original journals were "changed" or "modified" (rather than completely "replaced") by plaintiff, in which case the defendant would not be relieved of responsibility for negligence as to the basic structural and design characteristics of the original roll. To conclude that the jury intended its affirmative answer to "D" to indicate that the ruptured journal in question was not defendant's would simply fly in the face of the jury's response to questions 17 and 18. Those questions related to comparative negligence and must be read in light of the instructions given the jury on that subject. *See Gallick v. Baltimore and Ohio Railroad Co., supra*. The jury was told that questions 17 and 18 should be answered *only* if either 14 and/or 16 was answered affirmatively (i.e. that defendant was in some respect negligent and that such negligence was the proximate cause of damage to plaintiff). They were orally instructed on Rhode Island's comparative negligence law, after the text of the law itself was read to them:

"That is to say if you find both the plaintiff and the defendant negligent and it was the combined negligence of both that proximately caused the accident and injuries and property damages you must compare the negligence of each in determining the amount of damages to be awarded."

Read in the light of these instructions, the jury's finding, in question 18, that plaintiff's own negligence contributed 55% to his property damage must also indicate that the jury found the negligence of *both* parties to have contributed to plaintiff's property damage, in the comparative ratio of 55% plaintiff to 45% defendant. There was simply no evidence to support speculation that the jury ignored the instructions in the case and found plaintiff 55% negligent without having found that defendant's negligence contributed to plaintiff's property damage. The jury's finding is simply inconsistent with defendant's contention that the jury absolved it from all liability by its affirmative answer to question "D". See *Griffin v. Matherne*, *supra*. Furthermore, I cannot accept defendant's theory that the "damage" referred to in question 14 must have been interpreted by the jury to mean something *other* than fire damage to plaintiff's property. See note 3.

Notwithstanding the impossibility of entering judgment for defendant, the jury's findings as to the causal connection between defendant's negligence and the damage in question were inconsistent, as discussed earlier, and therefore the jury's responses, taken as a whole, cannot be viewed as indicating a plaintiff's verdict.

Based on the foregoing, I find there is simply no view of the case which makes the jury's answers, taken as a whole, consistent with the entry of judgment for either party, and thus the case must be tried anew. *Griffin v. Matherne*, *supra*; *Wright v. Kroeger Corp.*, 422 F. 2d 176 (5th Cir. 1970); *Martin v. Gulf States Utilities Co.*, 344 F. 2d 34 (5th Cir. 1965); *United States Fidelity & Guaranty Co. v. Brian*, 337 F.

2d 881 (5th Cir. 1964) *cert. denied*, 381 U.S. 913; *R.B. Company v. Aetna Insurance Co.*, 299 F. 2d 753 (5th Cir. 1962).

By Order,

L. THOMAS SHAFERA,
Acting Chief Deputy Clerk.

Enter:

RAYMOND J. PETTINE,
Chief Judge:
June 10, 1974.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

No. Misc. 74-8066.

ATLANTIC TUBING & RUBBER COMPANY,
PLAINTIFF, APPELLEE,

v.

INTERNATIONAL ENGRAVING COMPANY,
DEFENDANT, APPELLANT.

Order of Court.

Entered August 21, 1974.

After a trial on the merits plaintiff's case was submitted to the jury on a set of special questions. The jury had answered these questions on negligence and strict liability, and some supplemental questions, in a manner that the trial court concluded was inconsistent. The court accordingly declined to enter a verdict on the answers, and declared a mistrial. It filed a detailed statement of its reasons for so doing and, finding that no controlling unsettled questions of law were involved, declined to certify an appeal under 28 U.S.C. § 1292(b).

Plaintiff has appealed. But this court lacks jurisdiction as the orders declaring a mistrial and ordering a new trial are interlocutory. See 9 J. Moore, *Federal Practice* ¶110.08[3], at p. 122 (2nd ed. 1970). Whether the issues raised by the appellant are meritorious is not the issue; they will be preserved for seasonable review.

The well established policy against piecemeal appellate review always carries with it the potential hardship that a party with a meritorious point will be obliged to bide his time — sometimes at considerable expense — before his position can be vindicated. But alternatives to the rule entail the even more serious defect that correct rulings by the trial court will be subject to review in a number of successive appeals, continually hamstringing the trial process, and incalculably increasing the expense and length of litigation in general.

The orders appealed from do not raise important questions which, unless reviewed immediately, will cease to be reviewable. *Cf. Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Nor is the district court's ruling so obviously and blatantly beyond its authority that we will consider intervention under our mandamus powers.

The appeal is dismissed for want of appellate jurisdiction.

By the Court:

DANA H. GALLUP,
Clerk.

Entered: August 21, 1974.

Appendix B.

United States Court of Appeals For the First Circuit

No. 75-1014

ATLANTIC TUBING & RUBBER COMPANY,
PLAINTIFF, APPELLANT,

v.

INTERNATIONAL ENGRAVING COMPANY,
DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND
(RAYMOND J. PETTINE, *U.S. District Judge*)

Before COFFIN, Chief Judge,
McENTEE, Circuit Judge, and
THOMSEN, Senior District Judge.*

*George M. Vetter, Jr., with whom Frank T. Barber III, Lecomte, Shea & Dangora, and Hinckley, Allen, Salisbury & Parsons were on brief, for appellant.
Ralph J. Gonnella, with whom Thomas C. Angelone and Hodosh, Spinello, Hodosh & Angelone were on brief, for appellee.*

January 13, 1976

THOMSEN, Senior District Judge. Plaintiff appeals from a judgment entered pursuant to a general verdict for defendant at the second trial of this case. The first ended in a mistrial because the district judge concluded that the answers to questions submitted to the jury pursuant to Rule 49(a), F. R. Civ. P., were inconsistent with respect to certain

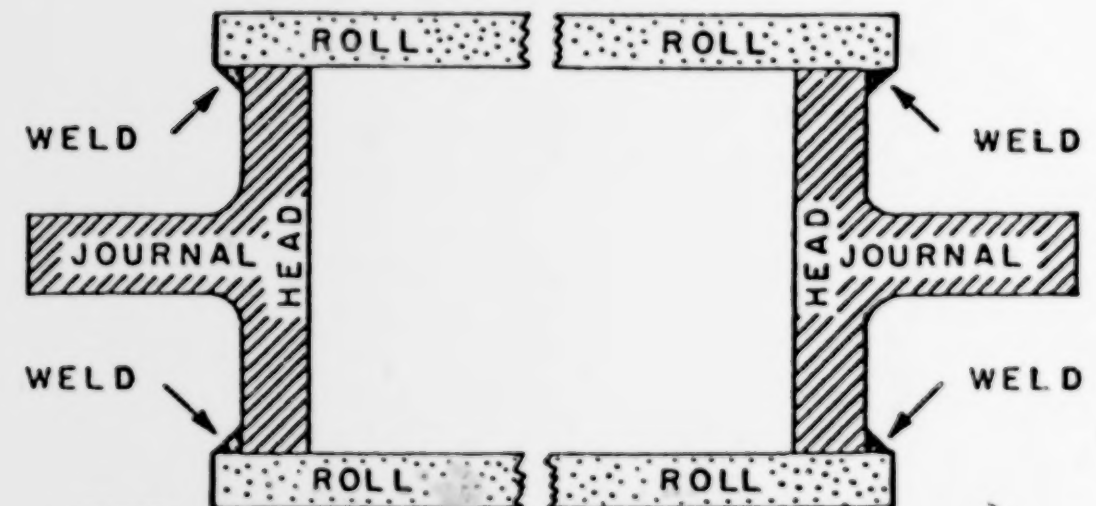
*Of the district of Maryland, sitting by designation.

2 ATLANTIC TUBING & RUBBER CO. v. INT'L ENGRAVING CO.

issues. Plaintiff argues that the district judge erred in not entering a judgment for plaintiff at the first trial, and in his instructions to the jury at the second trial.

In 1965 plaintiff ordered from defendant an embossing roll, a cylinder, to be used in the process of forming soft plastic into sheets. Plaintiff specified that the ends of the embossing roll be of one-piece construction, i.e., that the ends of the cylinder (the "heads") and the posts which jut out from the heads (the "journals") be made from a single piece of steel, as shown in Figure 1. Defendant changed the design of each head and journal to a two-piece construction, joining each head and journal by means of a "shrink fit" and a weld,¹ as shown in Figure 2.

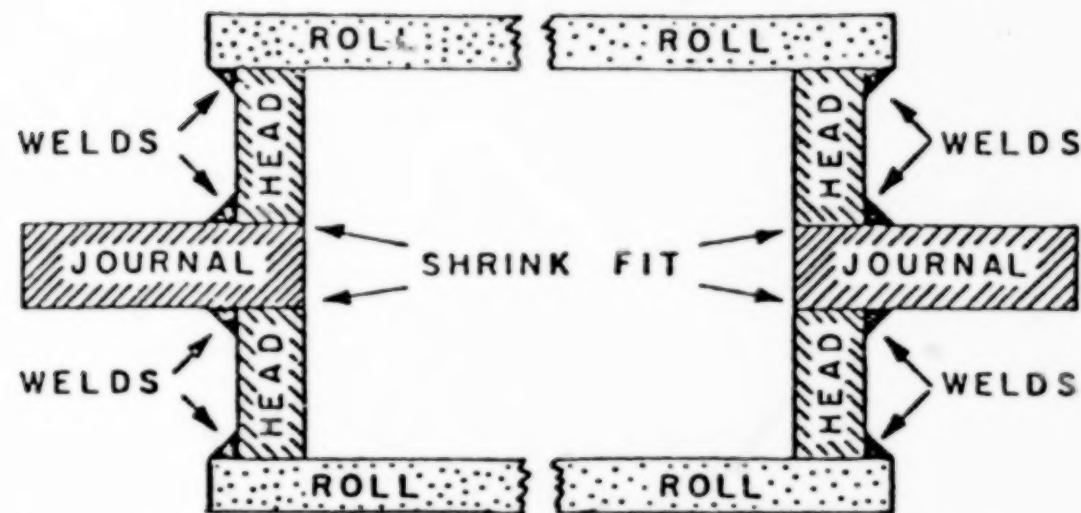
Figure 1.



¹ The purpose of a shrink fit is to hold the two pieces of metal together securely. There are degrees of shrink fit depending on the stresses and strains which the assembly has to bear. The shrink fit used here consists of fitting a cylindrical piece of metal (the journal) into a flat piece of metal with a round hole in it (the head). The hole is slightly smaller than the cylinder. The head is heated, which expands the size of the hole, and the journal is then inserted into the hole. When the head cools, the hole shrinks around the journal, thereby accomplishing a shrink fit.

In addition to the shrink fit a weld was applied around the circumference of the journal at the outside juncture of the journal and the head. The purpose of the weld is to add strength, and to seal the joint so that no fluid can escape.

Figure 2.



The rolls are used under various temperatures and pressures; the roll involved in this case had a smooth surface, which indicated that it would probably be used at lower temperatures and pressures than rolls with engraved surfaces. On March 25, 1972, while the roll was being used in a normal manner, one journal and head separated from each other sufficiently to allow a flammable coolant to leak out, vaporize and ignite, causing considerable damage to plaintiff's property.

At the first trial plaintiff contended that the separation of the head from the journal was caused either by an improperly designed shrink fit or an improperly manufactured shrink fit. The complaint included a count based on a strict liability theory² as well as a count based on alleged negligence in design and manufacture. Defendant offered evidence (which was not conceded but was not contradicted by plaintiff) that the journals on the roll at the time of the accident were longer than the journals on the roll at the time it was delivered to plaintiff by defendant, and therefore

² *Ritter v. Narragansett Electric Co.*, 109 R.I. 176, 283 A.2d 255 (1971); *Restatement of Torts*, 2d., § 402A.

must have been replaced by plaintiff or someone on its behalf. Such a replacement would have necessitated the destruction of the original shrink fit and weld, relieving defendant of any liability.

After the close of the evidence at the first trial, the district judge submitted eighteen written questions to the jury under Rule 49(a).³ The jury answered the questions, but was not discharged, because no question with respect to the amount of damages had been submitted to it.

The jury's answers justified the judge in ruling that defendant was not liable under a strict liability theory. Plaintiff does not challenge that ruling; it argues that the answers required the entry of a judgment for plaintiff on the issue of design negligence. After considering the answers, however, the district judge believed that the answers to the questions bearing on the issues of liability for design negligence and manufacturing negligence were inconsistent or ambiguous. After conferring with counsel, the judge decided that additional questions should be submitted to the jury to clarify their previous findings.

Accordingly, the judge prepared and submitted additional questions to the jury, with an appropriate explanation and

³ "Rule 49. Special Verdicts and Interrogatories.

"(a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict."

instructions.⁴ The jury answered the questions and appended a note to the judge. The result was confusion worse confounded. The judge properly concluded that the answers to the questions dealing with negligent design were inconsistent and precluded entry of a judgment in favor of either party on the negligence issues.⁵ He therefore ordered a new trial "limited to the issues of negligence."

Such a trial was held and resulted in a general verdict for defendant. No interrogatories were requested or submitted at that trial.

The First Trial

Plaintiff argues: (1) that the answers to the first set of questions submitted to the jury were consistent and required the entry of a judgment for plaintiff; and (2) that the district judge did not have the power under Rule 49(a) or otherwise to submit a second set of questions to the jury. Plaintiff does not deny that if the answers to the second set of questions may be considered, a new trial was properly ordered.

A preliminary issue to consider is the scope of appellate review over the district court's determination that the jury's responses were "ambiguous, if not inconsistent." Plaintiff suggests that this court must exercise an independent judgment on the question of the consistency or unambiguous character of the jury's answers to the interrogatories, and, if we believe that the jury's responses are not irreconcilably inconsistent, we must reverse and order the district court to enter a judgment for plaintiff. In support of this contention, plaintiff relies upon language in *Atlantic & Gulf Stevedores*

⁴ The judge took pains to let the jury know that he was not criticizing their initial answers.

⁵ The answers to the questions dealing with negligent manufacture indicated that the defendant negligently failed to properly weld and/or shrink fit the embossing roll, but that such negligence was not the proximate cause of plaintiff's damage. The jury also sent the judge a note which clearly indicated that it was hopelessly confused.

v. *Ellerman Lines*, 369 U.S. 355, 364 (1962), and *Gallick v. Baltimore & Ohio R. Co.*, 372 U.S. 108, 119 (1963), to the effect that it is the duty of the federal courts to attempt to harmonize the jury's answers to the interrogatories, if that is possible under a fair reading of them. We recognize, as did the district court, the force of this language, but we do not believe it supports the proposition that plaintiff urges. *Gallick* and *Atlantic & Gulf Stevedores* were both cases in which an intermediate appellate court had reversed a trial court's judgment on the ground that the jury's responses to the interrogatories were inconsistent. Both cases thus arose in a context in which an appellate court disagreed with a trial court's determination that the jury's responses should be accepted. Under these circumstances, the Supreme Court held that an appellate court must affirm if there is a view of the case that makes the jury's answers to the interrogatories consistent.

Although a trial court must be sensitive to the principles of *Gallick* and *Atlantic & Gulf Stevedores*, it has considerable discretion in applying them, and its refusal to enter judgment on the basis of a jury's answers to a set of interrogatories should not be reversed simply because an appellate court concludes that it is possible to reconcile the jury's responses. A federal trial court has broad discretion to refuse to accept a general verdict and to order a new trial when it believes that the ends of justice so require. See *Aetna Casualty & Surety Co. v. Yeatts*, 122 F.2d 350, 354 (4 Cir. 1941) (Parker, C.J.); F. R. Civ. P. 59. This discretion encompasses the power to refuse to accept a jury's answers to special interrogatories. Hence, this court should reverse only if we find that the district court abused its discretion in refusing to enter a judgment for plaintiff.

Applying these principles to the case at bar, we cannot say that the district court committed reversible error in refusing

to enter a judgment based upon the jury's initial answers to the interrogatories. The jury's answers were very difficult to reconcile. In question seven, the jury found that the embossing roll was not defectively designed — that is, that if properly manufactured it was not of a design that was unreasonably dangerous to the plaintiff — but in question thirteen the jury found that the defendant was negligent in modifying the design from one-piece to two-piece construction without knowing the specific operating data. The district judge feared that the jury's response to question thirteen was based upon a belief that defendant had breached its contract with plaintiff and upon the jury's failure to recognize the difference between breach of contract and negligence. Even more problematic were the jury's findings on proximate causation. In question fourteen, the jury found that defendant's negligence in modifying the design without knowledge of the specific operating data was a proximate cause of plaintiff's harm, but in question sixteen the jury found that defendant's negligent failure to properly weld and/or shrink fit the two-piece embossing roll was not a proximate cause of plaintiff's harm. Although plaintiff attempts to reconcile these two sets of answers on the grounds that the jury made fine distinctions and/or believed that there could be only one proximate cause, we cannot hold that the district court — which had no general verdict against which to measure the jury's responses as it would have had if F. R. Civ. P. 49(b)'s procedure had been followed — committed reversible error in concluding that the jury's responses resulted from confusion or inconsistency.⁶

Our decision that the district court did not abuse its discretion in refusing to enter judgment for plaintiff disposes of

⁶ The district court's view was confirmed by the jury's answers to the four additional questions the district court submitted and by the note the jury returned with its answers.

plaintiff's second contention as well. Even if we were to conclude that the district court erred in submitting additional questions to the jury, it would not help plaintiff, since the second trial would have been required in any event. Thus, even if the district court erred in submitting additional questions, the error was harmless.

The Second Trial

As noted above, the district court limited the grant of a new trial to issues of negligence, holding that the special verdicts at the first trial required entry of judgment for defendant on all issues of strict liability in tort. Plaintiff does not attack that limitation.

At the second trial, although plaintiff conceded that a two-piece design with a proper shrink fit would be adequate, it contended that defendant should have obtained "specific operating data" from plaintiff before designing the shrink fit. However, plaintiff did not offer any evidence tending to prove that the embossing roll involved in this case had been designed to have a shrink fit weaker than that normally employed on such a roll, or that the operating data which would have been supplied if defendant had asked for it would have revealed any unusual temperature or pressure requirements. Under these circumstances, the instructions to the jury removing negligent design from their consideration were correct, because plaintiff did not offer evidence tending to show that defendant's failure to ask for operating data had any causal connection with the damage suffered by plaintiff.

Plaintiff also challenges the instruction given the jury that if defendant could not have foreseen the use of a flammable coolant, it would not be liable for the fire damage. The question whether a defendant should be liable for all consequences of a negligent act, foreseeable or otherwise, and despite intervening acts, negligent or not, has received many

different answers. See cases cited in Prosser, Torts, 4th ed. (1971), §§ 43, 44. The Rhode Island decisions, which control this diversity case, indicate: (1) that reasonable foreseeability is an important factor in placing practical limits on a defendant's liability for negligence. *D'Ambra v. United States*, ... R.I. ..., ..., 338 A.2d 524, 528, 529 (1975), see also, *id.*, ... R.I. at ..., 338 A.2d at 533 (concurring opinion; and (2) that the question of foreseeability is generally for the jury. *Denisewich v. Pappas*, 97 R.I. 432, 438, 198 A.2d 144, 148 (1964). See also Prosser, § 45 at 290.

Finally, although not necessary for decision, we observe that plaintiff at no time introduced any evidence that the journals were the same journals it received from defendant. There was evidence that the serial number on the damaged head identified that head as having been supplied by defendant. There was no evidence, however, that the original journal had remained in place — not even testimony that no change had been made. In contrast, defendant introduced uncontradicted evidence that it manufactured the roll (including the journals) in accordance with its blueprints, that the journals on the damaged rolls were not the journals it supplied, that journals can be, and often are replaced, and that to replace a journal, the original shrink fit and weld must be destroyed.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

No. 75-1014.

ATLANTIC TUBING & RUBBER COMPANY,
PLAINTIFF, APPELLANT,

v.

INTERNATIONAL ENGRAVING COMPANY,
DEFENDANT, APPELLEE.

Judgment.

Entered January 13, 1976

This cause came on to be heard on appeal from the United States District Court for the District of Rhode Island, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment and orders of the District Court are affirmed.

By the Court:

/s/ DANA H. GALLUP
Clerk.

Appendix C.

DISTRICT COURT OF THE UNITED STATES.
FOR THE DISTRICT OF RHODE ISLAND.

ATLANTIC TUBING & RUBBER CO.

v.

C.A. No. 5142.

INTERNATIONAL ENGRAVING CO.

Jury Interrogatories.

1. Do you find the defendant could reasonably have anticipated or foreseen the use of this embossing roll with methanol or any other flammable liquid as a coolant?

Answer: "Yes" or "No"

ANSWER: YES

If your answer is "No," omit questions 2, 3, 4, 5, 6, 7, 8 and 9 and proceed to question 10. If your answer is "Yes," proceed to question 2.

2. Do you find the embossing roll, at the time it was delivered to the plaintiff in 1965, was defectively manufactured so as to make it unreasonably dangerous to the plaintiff or to plaintiff's property in the normal use of the roll by the plaintiff over the years of its expected life? If you find that as delivered, the product was not unreasonably dangerous but that any harm which resulted was due to subsequent modifications or mishandling or some other cause, you must answer "No."

Answer: "Yes" or "No"

ANSWER: NO

If your answer is "Yes," then answer question 3. If your answer is "No," omit questions 3 and 4 and proceed to question 5.

3. Do you find that the plaintiff discovered the defect in manufacture and was aware or should have been aware of the danger but, nevertheless, proceeded unreasonably to use the embossing roll?

Answer: "Yes" or "No"

ANSWER: _____

If your answer is "Yes," do not answer question 4 and proceed to question 5. If your answer is "No," then answer question 4.

4. Do you find that the defect in the manufacture of the embossing roll was the direct and proximate cause of the injury to the plaintiff's property?

Answer: "Yes" or "No"

ANSWER: _____

Proceed to question 5.

5. Do you find that the plaintiff authorized the defendant to modify the original design for a one-piece embossing roll and instead construct a two-piece embossing roll as is the subject of this controversy?

Answer: "Yes" or "No"

ANSWER: NO

If your answer is "Yes," omit questions 5, 7, 8 and 9 and proceed to question 10. If your answer is "No," proceed to question 6.

6. Do you find that the defendant did in fact design, manufacture and deliver to the plaintiff in 1965 a two-piece embossing roll?

Answer: "Yes" or "No"

ANSWER: YES

If your answer is "Yes," then answer question 7. If your answer is "No," then omit questions 7, 8 and 9 and proceed to question 10.

7. Do you find that the two-piece embossing roll, at the time it was delivered to the plaintiff in 1965, was defectively designed, i.e. that the two-piece embossing roll, even if properly manufactured, was of a design that was unreasonably dangerous to the plaintiff or its property in the normal use of the roll by the plaintiff over the years of its expected life?

Answer: "Yes" or "No"

ANSWER: NO

If your answer is "Yes," then proceed to question 8. If your answer is "No," omit questions 8 and 9 and proceed to question 10.

8. Do you find that the plaintiff discovered the defect in the defendant's two-piece design and was aware or should

have been aware of the danger but, nevertheless, proceeded unreasonably to use the embossing roll?

Answer: "Yes" or "No"

ANSWER: _____

If your answer is "Yes," omit question 9 and proceed to question 10. If your answer is "No," then proceed to the next question numbered 9.

9. Do you find that the defect in defendant's two-piece design of the embossing roll was the direct and proximate cause of injury to plaintiff's property?

Answer: "Yes" or "No"

ANSWER: _____

Proceed to question 10.

10. Do you find that the defendant did in fact design, manufacture and deliver to the plaintiff in 1965 a two-piece embossing roll? (Same as question 6)

Answer: "Yes" or "No"

ANSWER: YES

If your answer is "Yes," then proceed to and answer question 11. If your answer is "No," then omit the remaining questions.

11. Do you find that in 1965 the plaintiff ordered from the defendant an embossing roll of one-piece design and construction?

Answer: "Yes" or "No"

ANSWER: YES

If your answer is "Yes," proceed to question 12. If your answer is "No," omit questions 12, 13 and 14 and proceed to question 15.

12. Do you find that the defendant had knowledge of the specific pressures, temperatures, speeds and other operating data as to how plaintiff would use the roll?

Answer: "Yes" or "No"

ANSWER: NO

If your answer is "No," then proceed to question 13. If your answer is "Yes," then omit questions 13 and 14 and proceed to question 15.

13. Do you find that the defendant was negligent in modifying the design from one-piece to two-piece construction without having knowledge of the specific pressures, temperatures, speeds and other operating data as to how plaintiff would use the roll?

Answer: "Yes" or "No"

ANSWER: YES

If your answer is "Yes," proceed to question 14 only if you also answered question 1 "Yes." If this question and/or question 1 is answered "No," then omit question 14 and proceed to question 15.

14. Do you find that such negligence was the direct and proximate cause of damage to plaintiff?

Answer: "Yes" or "No"

ANSWER: YES

Proceed to question 15.

15. Do you find that the defendant was negligent by failing to properly weld and/or shrink fit the two-piece embossing roll?

Answer: "Yes" or "No"

ANSWER: YES

If your answer is "Yes," then proceed to question 16 only if you also answered question 1 "Yes." If this question and/or question 1 is answered "No," you do not answer question 16.

16. Do you find that such negligence was the direct and proximate cause of damage to plaintiff?

Answer: "Yes" or "No"

ANSWER: NO

The following questions (17 and 18) should be answered *only* if your answer to question 14 and/or 16 is "Yes." If both questions 14 and 16 are answered "No," then, omit questions 17 and 18.

17. Do you find that the plaintiff's own negligent conduct contributed at all to the injury to plaintiff's property in any one or more of the following respects:

- a) failing to inspect the embossing roll for defects
Answer: "Yes" or "No"

ANSWER: YES

- b) use of a flammable coolant
Answer: "Yes" or "No"

ANSWER: NO

- c) failure to take adequate precautions should the coolant escape
Answer: "Yes" or "No"

ANSWER: YES

- d) failure in operation, maintenance and repair of the roll
Answer: "Yes" or "No"

ANSWER: YES

If you have answered "Yes" to either "a", "b", or "c", then proceed to question 18. If you have answered "No" to "a", "b", and "c", then omit question 18.

18. To what extent, expressed in percentage, did plaintiff's negligence contribute to his property damage?

ANSWER: 55%

RAYMOND LATROVERSE

**DISTRICT COURT OF THE UNITED STATES.
FOR THE DISTRICT OF RHODE ISLAND.**

ATLANTIC TUBING & RUBBER CO.

v.

C.A. No. 5142.

INTERNATIONAL ENGRAVING CO.

Further Jury Interrogatories.

You have found in question 7 that the two-piece embossing roll, at the time it was delivered to the plaintiff in 1965, was not defectively designed, that is, that even if properly manufactured was not of a design that was unreasonably dangerous to the plaintiff or its property in the normal use of the roll by the plaintiff over the years of its expected life. However, in question 13 you found that the defendant was negligent in modifying the design from one-piece to two-piece construction without having knowledge of the specific pressures, temperatures, speeds and other operating data as to how the plaintiff would use the roll.

A. I now ask you — do you find that the two-piece embossing roll, though not defectively designed as to be unreasonably dangerous as recited in question 7, was nevertheless negligently designed?

Answer: "Yes" or "No"

ANSWER: YES

If your answer is "Yes, " answer the following question:

B. In question 15 you found that the defendant was negligent by failing to properly weld and/or shrink fit the two-piece embossing roll. However, in question 16 you found that such negligence was not the direct and proximate cause of damage to plaintiff. I now ask you —

Do you find it was the negligent design which caused it to rupture?

Answer: "Yes" or "No"

ANSWER: NO

If your answer is "Yes," proceed to answer question "C."

C. Do you find such negligent design was the direct and proximate cause of damage to the plaintiff?

Answer: "Yes" or "No"

ANSWER: _____

D. Do you find that the plaintiff modified the roll by changing the journals after delivery?

Answer: "Yes" or "No"

ANSWER: YES

Your Honor:

We find that the defendant was wrong in changing the design from a one-piece to a two-piece construction without having knowledge of the specific pressures, temperatures, speeds, et cetera, as to how plaintiff would use the roll, but that the two-piece construction was not unreasonably dangerous in itself, nor was it the direct and proximate cause of the fire.

We find no evidence that the two-piece construction made by the defendant was defective.

We also find that the fire would not have occurred had the defendant used some type of nonflammable coolant.

Signed:

R. Latroverse

V. Perfetto Jr.

Irwin Will

Paul F. Cavanaugh

Sue Stringham

Samuel H. Banford

Appendix D.

UNITED STATES CONSTITUTION, AMENDMENT VII.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

FEDERAL RULES OF CIVIL PROCEDURE, RULE 49.

Special Verdicts and Interrogatories.

(a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

(b) General Verdict Accompanied by Answer to Interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

As amended Jan. 21, 1963, eff. July 1, 1963.

JUN 9 1978

MICHAEL RODAK, JR., CLERK

**In the
Supreme Court of the United States.**

OCTOBER TERM, 1975.

No. 75-1465.

ATLANTIC TUBING & RUBBER COMPANY,
PETITIONER,

v.

INTERNATIONAL ENGRAVING COMPANY,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief for Respondent in Opposition.

RALPH J. GONNELLA,
HODOSH, SPINELLA, HODOSH & ANGELONE,
808 Union Trust Building,
Providence, Rhode Island 02903.

Of Counsel:

THOMAS C. ANGELONE,
HODOSH, SPINELLA, HODOSH & ANGELONE,
808 Union Trust Building,
Providence, Rhode Island 02903.

Table of Contents.

Question presented	1
Statement of the case	2
Argument	4
I. Certiorari should be denied because the decision below is clearly correct, there is no conflict of decision and there is no important question of federal law	4
II. Certiorari should be denied because there are independent bases for affirming the judgment below	8
Conclusion	9

Table of Authorities Cited.

CASES.

Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355 (1962)	5
Gallick v. Baltimore & Ohio R.R. Co., 372 U.S. 108 (1963)	5, 6, 7
Iacurci v. Lummus Co., 387 U.S. 86 (1967)	4, 7
Langnes v. Green, 282 U.S. 531 (1931)	8
McVey v. Phillips Petroleum Co., 288 F. 2d 53 (5th Cir. 1961)	6

CONSTITUTIONAL AND STATUTORY PROVISIONS.

United States Constitution, Seventh Amendment	1, 4, 5, 6, 7, 8
28 U.S.C. 1332(a)(1)	2

PROCEDURAL RULES.

Federal Rules of Civil Procedure	
Rule 49(a)	1, 2, 4
Rule 50	7
Rule 59	7

**In the
Supreme Court of the United States.**

OCTOBER TERM, 1975.

No. 75-1465.

ATLANTIC TUBING & RUBBER COMPANY,
PETITIONER,

v.

INTERNATIONAL ENGRAVING COMPANY,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief for Respondent in Opposition.

Question Presented.

Whether plaintiff was deprived of its Seventh Amendment right to trial by jury as a result of the procedure followed by the district court in submitting special questions to the jury pursuant to Rule 49(a), F.R.C.P.

Statement of the Case.

This action was commenced on March 16, 1973, by the plaintiff, Atlantic Tubing and Rubber Co., a Rhode Island corporation, against the defendant, International Engraving Co., a New Jersey corporation. Jurisdiction was based upon diversity of citizenship. 28 U.S.C. 1332(a)(1). Plaintiff's claim, in essence, stated that it had purchased a product (an embossing roll) from the defendant, and that the product failed (ruptured) while in operation, permitting a cooling fluid to escape from the roll which fluid ignited, causing a fire which resulted in substantial property damage (App. 16).*

Plaintiff's complaint stated several counts including, *inter alia*, claims of negligence, strict liability and breach of warranty — its principal contention being that the plaintiff had ordered a "one-piece" embossing roll and that defendant had supplied a "two-piece" embossing roll without authorization from the plaintiff (breach of warranty). Plaintiff further claimed that the "two-piece" embossing roll which defendant delivered was defective (strict liability), and/or was negligently designed or manufactured (negligence). The case went to trial on the strict liability and negligence claims (App. 15-16).

At the first trial, the issue of liability was submitted to the jury on special questions pursuant to Rule 49(a), F.R.C.P. (App. 17, 24-30). The questions dealt separately with the issues of strict liability and negligence. After deliberation, the jury returned its answers to the special questions. On the issue of strict liability, the jury found clearly and unequivocally for the defendant (See questions 2-10, App. 24-27). On the issue of negligence, the jury returned answers which the defendant claimed, and the court believed, were inconsistent, ambiguous

and insufficient to support a verdict (App. 17). The court *sua sponte* decided to ask the jury additional special questions to resolve the inconsistency and ambiguity (App. 1). At the request of defendant, the court added one additional question submitted by defendant.

In its answers to the additional questions, the jury made a finding that "the plaintiff modified the roll by changing the journals . . ." (App. 32). Because the matter could not be immediately resolved, the court, with the agreement of the parties, dismissed the jury and requested that the parties file memoranda supporting their respective positions (App. 2).

After receiving memoranda from the parties, the court found that the answers to the special questions *on the negligence issue* were fatally inconsistent and ordered a new trial (App. 2-3). Upon motion of defendant, the court limited its new trial order to the issue of negligence (App. 21).

Plaintiff subsequently sought certification for an interlocutory appeal which the district court denied. Plaintiff thereafter filed a notice of appeal to the First Circuit Court of Appeals from the order of the district court ordering a new trial which was dismissed by the First Circuit on jurisdictional grounds (Order, August 21, 1974, Misc. No. 74-8066, App. 12-13).

The second trial commenced on October 17, 1974. The evidence elicited in the second trial (which was limited to the issue of negligence) was essentially the same as that elicited in the first trial. At the close of the evidence, defendant moved for a directed verdict on the basis that uncontroverted evidence showed that the journals had been replaced after delivery. The court reversed decision on defendant's motion. The second trial went to the jury on a general verdict. After deliberation, the jury returned a verdict for the defendant (App. 14).

* References throughout this brief to the Appendix refer to the Petitioner's Appendix.

Argument.

I. CERTIORARI SHOULD BE DENIED BECAUSE THE DECISION BELOW IS CLEARLY CORRECT, THERE IS NO CONFLICT OF DECISION AND THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW.

The issue in this case may properly be stated as whether the plaintiff herein was deprived of its right to trial by jury as guaranteed by the Seventh Amendment to the United States Constitution. Although plaintiff has attempted to obfuscate the real issue by attacking certain language in the circuit court's opinion, and by stating questions which need no answer, the fact remains that the procedure followed by the district court herein was consistent with the guarantee of the Seventh Amendment and with previous decisions of this Court. To understand properly the real issue, it is necessary briefly to outline what happened in the district court.

The issues of the first trial were submitted to the jury by special questions pursuant to Rule 49(a), F.R.C.P. (App. 17, 24-30). The questions dealt separately with the issues of strict liability and negligence. The jury returned its answers to the original set of questions in a manner that clearly found for the defendant on the issue of strict liability (App. 17). However, the jury's answers to the questions dealing with design negligence and manufacturing negligence were at least ambiguous if not inconsistent (App. 1).

Faced with the possibility of inconsistent answers to the negligence questions, the district court was justifiably concerned about the true intent of the jury. Cf. *Iacurci v. Lummus Co.*, 387 U.S. 86 (1967). In order to clarify the true intent of the jury and to avoid the necessity of a new trial, the district court submitted additional questions to the jury

dealing only with the issues and answers that appeared to be inconsistent.¹ The jury returned its answers to the additional questions together with an "explanatory" note (App. 31-33). The additional answers and the "explanatory" note clearly showed that the jury was hopelessly confused on the negligence issue. After receiving memoranda from the parties, the district court ruled that the jury's responses on the negligence issue were fatally inconsistent and ordered a new trial limited to the issue of negligence (App. 2, 18).

It is important to point out that plaintiff does not attack the district court's ruling which held that the jury's responses to *all* the questions were fatally inconsistent on the negligence issue. Rather, plaintiff contends that the district court had no right to ask the additional questions and, therefore, it was the obligation of the Court of Appeals to ignore the additional answers and the explanatory note, to reconcile the answers to the first set of questions and to enter judgment for plaintiff.

Clearly, the district court did not violate the guarantee of the Seventh Amendment or any decision of this Court when it requested the *jury* to give answers to additional questions. Had the district court immediately declared a mistrial after the initial responses were given, plaintiff might argue that the principles announced in *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355 (1962), and *Gallick v. Baltimore & Ohio R.R. Co.*, 372 U.S. 108 (1963), had been violated. But here the district court simply asked the *jury* to give additional responses. Surely, plaintiff cannot argue that the district court was incorrect in letting the jury decide the issues or that the procedure violated the Seventh Amendment.

¹ The jury had not been discharged and was readily available to answer additional questions. Before submitting the additional questions, the district court took great pains to let the jury know that he was not criticizing its initial answers (App. 18, n. 4).

The procedure followed by the district court is consistent with the Seventh Amendment and previous decisions of this court. In *Gallick v. Baltimore & Ohio R.R. Co.*, *supra*, at 119, this Court held:

"We therefore must attempt to reconcile the jury's findings, by exegesis if necessary, as in *Arnold v. Panhandle & S.F.R. Co.*, 353 U.S. 360; *McVey v. Phillips Petroleum Co.*, 288 F. 2d 53 (C.A. 5th Cir.); *Morris v. Pennsylvania R.R. Co.*, 187 F. 2d 837 (C.A. 2d Cir.) (collecting authorities), before we are free to disregard the jury's special verdict and remand the case for a new trial."

This Court cited at 119 *McVey v. Phillips Petroleum Co.*, 288 F. 2d 53 (5th Cir. 1961), as an example of what the courts should do in order to avoid a mistrial. In *McVey* the district court, after receiving the jury's initial responses which it deemed inadequate, resubmitted the questions with additional instructions. The jury returned its further answers with an "explanatory" note. The district court not only considered the additional answers, but took into consideration the explanatory note in rendering a verdict. *McVey*, *supra*, at 55 ff. It certainly is consistent with the holdings in *Gallick* and *McVey* to conclude that the district court has the right, indeed the duty, to submit additional questions to clarify an ambiguity, cure an insufficiency or resolve an inconsistency. The only difference between this case and *McVey* is that the further answers herein demonstrated that the jury was hopelessly confused and "... confirmed the view that the initial responses were fatally inconsistent ..." (District Court Opinion, App. 8).

This is not a case where the district court was asking additional questions to create an inconsistency or to change the

jury's verdict. The context of the additional questions clearly demonstrates that the court was attempting to resolve and clarify the answers to the original questions. (See App. 31-33.)¹

Moreover, as the Court of Appeals properly held, the district court was not required to enter judgment for plaintiff even if the original answers were reconcilable. If the answers were insufficient to support a verdict or for some other reason were inadequate, the district court has the discretion to enter judgment notwithstanding the verdict or to order a new trial. Rules 50 and 59, F.R.C.P.; see, e.g., *Iacurci v. Lummus*, *supra*. After a review of the initial answers, the Court of Appeals held that the district court did not abuse its discretion in concluding that the initial answers did not support a verdict for plaintiff and, therefore, a new trial was necessary.

Thus, plaintiff cannot argue that it was deprived of its Seventh Amendment guarantee of a trial by jury. When the first answers were returned in an ambiguous and insufficient state, the district court asked the jury to clarify and resolve the answers rather than declaring a new trial. *Gallick v. Baltimore & Ohio R.R. Co.*, *supra*. When the further answers, which demonstrated that the jury was hopelessly confused, were returned, the district court ordered a new trial. Since plaintiff does not contend that it was entitled to judgment on all of the answers its Seventh Amendment argument is clearly without merit. To the contrary, the district court gave the plaintiff the full benefit of the jury's complete consideration and decision. It was only because the jury was

¹ Had the district court submitted additional questions that were totally unnecessary and which were asked in order to create an inconsistency, this Court could reverse, declaring that the district court abused its discretion. However, since that is not the case here, plaintiff's argument is reduced to a claim that its Seventh Amendment right to trial by jury was denied because the jury was asked additional questions.

hopelessly confused and its answers were inconsistent that a new trial was necessary. After a second trial a jury returned a general verdict for the defendant.

It is abundantly clear that this case presents no cognizable constitutional issue nor does the decision below conflict with any decision of this Court or any other circuit court. The procedure followed by the district court utilized to the fullest extent the fact-finding function of the jury and cannot be attacked as violating the Seventh Amendment.

II. CERTIORARI SHOULD BE DENIED BECAUSE THERE ARE
INDEPENDENT BASES FOR AFFIRMING
THE JUDGMENT BELOW.

In addition to the arguments advanced above, this Court should not grant certiorari because there are independent bases for affirming the judgment below. *Langnes v. Green*, 282 U.S. 531, 535-539 (1931). As the Court of Appeals noted:

"At the first trial . . . [d]efendant offered evidence (which was not conceded but was not contradicted by plaintiff) that the journals on the roll at the time of the accident were longer than the journals on the roll at the time it was delivered to plaintiff by defendant, and therefore must have been replaced by plaintiff or someone on its behalf. Such a replacement would have necessitated the destruction of the original shrink fit and weld, relieving defendant of any liability. . . ." (App. 16-17.)

"Finally, although not necessary for decision, we observe that plaintiff at no time introduced any evidence that the journals were the same journals it received from defendant. There was evidence that the serial number on the damaged head identified that head as having been

supplied by defendant. There was no evidence, however, that the original journal had remained in place — not even testimony that no change had been made. In contrast, defendant introduced uncontradicted evidence that it manufactured the roll (including the journals) in accordance with its blueprints, that the journals on the damaged rolls were not the journals it supplied, that journals can be, and often are replaced, and that to replace a journal, the original shrink fit and weld must be destroyed." (App. 22.)

Throughout these proceedings, defendant has maintained that it cannot be held liable for negligence since the journals on the original roll had been replaced. Defendant introduced uncontradicted and unrebutted evidence which demonstrated these facts and which absolved it of all liability.

Conclusion.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,
RALPH J. GONNELLA,
HODOSH, SPINELLA, HODOSH
& ANGELONE,
808 Union Trust Building,
Providence, Rhode Island 02903.

Of Counsel:

THOMAS C. ANGELONE,
HODOSH, SPINELLA, HODOSH & ANGELONE,
808 Union Trust Building,
Providence, Rhode Island 02903.

JUN 21 1976

MICHAEL RODAK, JR., CLERK

**In the
Supreme Court of the United States.**

OCTOBER TERM, 1975.

No. 75-1465.

**ATLANTIC TUBING & RUBBER COMPANY,
PETITIONER,**

v.

**INTERNATIONAL ENGRAVING COMPANY,
RESPONDENT.**

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.**

Reply Brief for Petitioner.

**GEORGE M. VETTER,
HINCKLEY, ALLEN, SALISBURY & PARSONS,
2200 Industrial Bank Building,
Providence, Rhode Island 02903.**

Of Counsel:

**FRANK T. BARBER, III,
LECOMTE, SHEA & DANGORA,
27 School Street,
Boston, Massachusetts 02108.**

**In the
Supreme Court of the United States.**

OCTOBER TERM, 1975.

No. 75-1465.

ATLANTIC TUBING & RUBBER COMPANY,
PETITIONER,

v.

INTERNATIONAL ENGRAVING COMPANY,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Reply Brief for Petitioner.

Argument.

Respondent's argument that certiorari should be denied because there is an "independent basis" to support the judgment below (respondent's brief, pp. 8-9) does not apply. The argument assumes that, because a party offers evidence to a jury, that evidence must be believed. This is not the law.

See *Cardente v. O'Leary*, 276 A. 2d 751, at 753 (R.I. 1971). Here, the jury did not believe the respondent's so-called "uncontradicted" evidence. The jury found negligence, proximate cause and that the negligence of both parties caused the accident (App. 28-30). The jury could not have made these findings if it had believed the journals had been replaced and had not been manufactured by the respondent.

The respondent's "independent basis" argument illustrates how a jury can be manipulated or confused by successive sets of special questions, and, consequently, the reason why this Court should grant certiorari. The respondent and the two lower courts isolate a finding of the jury in the second set of questions as a basis for an inconsistency, and as an "independent basis" to support a judgment for respondent. Yet, it was only the second set of questions which gave rise to this inconsistency and this "independent basis." In fact, at no time did the trial court or the appellate court find the first set of jury responses to be inconsistent. The "possibility of inconsistent answers" (respondent's brief, p. 4) cannot justify the second set of questions in light of the decisions of this Court. See *Gallick v. Baltimore & Ohio Railroad Co.*, 372 U.S. 108 (1963); *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Limited*, 369 U.S. 355 (1962).

The creation of an inconsistency by a second set of questions, and then the use of this inconsistency as an "independ-

ent basis" of judgment, demonstrates that this Court should grant certiorari in order to clarify the uses and abuses of Rule 49.

Respectfully submitted,
 GEORGE M. VETTER,
 HINCKLEY, ALLEN, SALISBURY
 & PARSONS,
 2200 Industrial Bank Building,
 Providence, Rhode Island 02903.

Of Counsel:

FRANK T. BARBER, III,
 LECOMTE, SHEA & DANGORA,
 27 School Street,
 Boston, Massachusetts 02108.